IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-860

HARRY WOLKIND,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF HENRICO COUNTY, VIRGINIA

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No.

HARRY WOLKIND,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF HENRICO COUNTY, VIRGINIA

Petitioner Harry Wolkind prays that a Writ of Certiorari issue to review a final judgment of the Circuit Court of Henrico County, Virginia.

PROCEEDINGS BELOW

No opinion has been written in this case. The trial judge decided the matters here presented at the time of the trial. The Supreme Court of Virginia declined to review the trial court proceedings. The Orders and Judgments of these courts are set forth in the Appendix.

JURISDICTION

The question presented here was first raised before trial in briefing on a motion to suppress. After all testimony was taken, the trial judge denied the motion from the bench. Petitioner was found guilty of the crimes of possession of marijuana with intent to distribute, Va. Code §18.2-248, and possession of cocaine, Va. Code §18.2-250, and was later sentenced to serve nine months in prison. A Petition for Review was timely filed in the Supreme Court of Virginia. On August 2, 1978, that court declined to review the case.[1] A timely Petition for Rehearing was denied on August 31, 1978. The jurisdiction of this Court is founded on 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether the Fourth Amendment is violated when police, who have not sought a warrant and who do not have probable cause to believe that contraband would be found, use an animal specially trained to ferret out contraband to establish whether locked private luggage stored in a private sleeping compartment contains contraband.

CONSTITUTIONAL PROVISIONS

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[1] Virginia and West Virginia are the only States in which appeal cannot generally be obtained as a matter of right. Denial of review ought not to be considered a 'merits' determination. *See* Lilly & Scalia, *Appellate Justice: A Crisis in Virginia?* 57 Va. Rev. 3, 14 (1971).

The Fourteenth Amendment provides in part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Facts:

At 10:00 p.m. on December 10, 1976, Officer R. M. Moss, an Amtrak investigator located in Henrico County, Virginia, received a telephone call from a confidential source in Florida. (Tr. I 47) The source, whose identity was never disclosed but whom the officer regarded as reliable, had picked petitioner out of a train-station crowd as a potential drug trafficker merely on the basis of a "drug courier profile." At trial Officer Moss listed all of the factors related to petitioner that were profile-significant. He stated that he was told that petitioner appeared to be very nervous. (Tr. I 69) He was, in addition, "a young, white male, approximate age – 26, wearing brown hair and a . . . neatly trimmed beard." (Tr. I 68) "He was casually dressed and he

had on a red and white striped shirt. He paid cash for his ticket and he made reservations the day of departure." (Tr. I 68) He carried his own bags and declined to check them, preferring the rack in his room. And he was heading north alone in a first class car. (Tr. I 69-71) During the trial the prosecutor stated:

> "[W]e're not trying to establish that – by the profile – that the Commonwealth has any probable cause for a search warrant; but [it] does have some kind of a guideline as to where the individual is gonna be at a certain period of time so that the Commonwealth can get probable cause for a possible search through the [investigation] of the search dog . . . . [T]here's a possibility that someone is on that train and may be carrying drugs . . . ." (Tr. I 50)[2]

At 10:30 p.m., Officer Moss notified the Henrico County Police of petitioner's pending arrival. (Tr. I 92) Six and one half hours later, at 5:00 a.m. the next morning, Moss and three policemen arrived at the local station to see whether in fact the suspect was in possession of contraband. They were accompanied by Czar, a German shepherd trained to detect concealed illegal drugs. (Tr. I 113)

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[2]In connection with attempted appeal to the Supreme Court of Virginia, respondent conceded that petitioner's "match" with this "profile" could not establish probable cause. (Brief in Opposition to a Petition For Writ of Error, 10.)

Officer Moss agreed. (Tr. I 114) He characterized the profile as "an investigative tool. . .," and then frankly stated that "we didn't have anything else to go on until the dog had alerted on the room." (Tr. I 111)

The dog's owner, handler, and trainer is Officer Gary Taylor of the Richmond Police Department. At trial Taylor was asked to compare the sense of smell of a dog to that of a human being. Taylor responded that the olfactory gland of a dog is "far superior . . . ." (Tr. I 141) He estimated that a dog is 100,000 times more sensitive to the presence of scents than is the average human. (*Id.*) He testified that this estimate was conservative. (*Id.*) Taylor believed this dog to be error-free. (Tr. I 142)[3]

Petitioner's train arrived at the Richmond station and the officers boarded the car in which he was located at approximately 6:00 a.m. (Tr. I 133) On Taylor's command to Czar to "find the drugs" the officers proceeded down the corridor. Upon arriving at petitioner's roomette Czar signalled the presence of contraband by biting and scratching at the roomette's door. (Tr. I 134)

Officer Moss then knocked on the door, identified himself as an Amtrak inspector, and asked to see petitioner's ticket. As the door opened, Moss showed identification and "requested the defendant to step out of the room for a further search." (Tr. I 103)[4] As

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[3]At trial petitioner's counsel asked Officer Moss to explain the significance of an "alert" by Czar. (Tr. I 123)

> A: We have a 100% success rate as far as removing passengers from the train that have had in possession controlled drugs. [sic]
> Q: Does that mean that every time there's an alert, there's an arrest?
> A: Correct.
> Q: Without exception?
> A: Without exception.

[4]The request was superfluous. The roomette is laid out as a square with each wall approximately 6.5 feet long. In addition to a bed it contains a closet, a covered toilet, a wash basin and a luggage

[footnote continued]

petitioner Wolkind stepped out Czar and Officer Taylor, without Wolkind's consent, stepped in. (Tr. I 150-151)

Taylor and Czar spent two to three minutes in the roomette. (Tr. I 105) Czar first "alerted" to a small suitcase on the floor under the bed. (Tr. I 152) Taylor then pulled a Samsonite suitcase from the overhead rack and dropped it onto the bed. Czar jumped up on the bed and signalled that it too contained contraband. Taylor and Czar then generally explored the room but discovered no other contraband.

Taylor testified at trial that molecules of marijuana "will permeate any material." (Tr. I 146) He explained that even though a Samsonite suitcase is basically water-tight and air-tight trace-odors of marijuana will pass through such a case and will be discovered by a trained dog. (*Id.*) Taylor stated that, because "masking aids" will not prevent this "trace" leakage, "a dog is superior to anything else." (*Id.*)

After Czar had completed his search, the police removed petitioner and his luggage from the train. Later, at the police station, petitioner's luggage was opened after a search warrant was obtained. The larger suitcase, which was locked, contained a plastic garbage bag enclosing a second such bag that in turn enclosed a paper bag filled with marijuana.[5] (Tr. I 176) The smaller suitcase, which was also locked, contained petitioner's clothes and a small amount of cocaine in a plastic film cannister. (Tr. I 171)

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rack. Moss testified that when the bed was in use there was little space in the room and standing was awkward. (Tr. I 118) Accordingly as Wolkind opened the door he simultaneously stepped out into the hall. (Tr. I 120)

[5] A quantity of baking soda was then placed between the two bags to absorb odor. (Tr. I 174-176)

Proceedings in the Court Below:

Petitioner's Fourth Amendment contention here was the subject of briefing before trial on a motion to suppress evidence. Petitioner was tried to the court on August 2, 1977, and argument was heard on the motion after all testimony was taken. (Tr. I 2) Petitioner argued that the detection in the corridor, the first "alert," was an illegal search.[6] On the basis of a line of recently decided cases[7] the trial judge denied petitioner's motion from the bench. (Tr. II 64-67) The trial judge also relied on his own past unreported rulings, and on the fact that the dog first indicated the presence of contraband when in the corridor outside the roomette. (Tr. II 69) But the trial judge took the unusual step of inviting appellate review of his own decision:

> "I do not pretend to say that I don't think [petitioner] might not be found to be right somewhere down the road, but I am not going to depar[t] from what I consider to be strong authority to the contrary at this stage." (Tr. II 66-67)

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[6] The prosecutor argued that *United States v. Chadwick*, 433 U.S. 1 (1977), foreclosed that question. (Tr. II 51, 52) Accordingly respondent did not argue or seek to prove the existence of circumstances which would permit a warrantless search.

[7] *People v. Campbell*, 67 Ill. 2d 308, 367 N.E. 2d 949 (1977), *cert. denied sub nom., Myers v. Illinois*, 435 U.S. 932 (1978); *State v. Elkins*, 47 Ohio App. 2d 307, 354 N.E. 2d 716 (1976); *United States v. Johnson*, 497 F.2d 397 (9th Cir. 1974); *United States v. Fulero*, 498 F.2d 748 (D.C. Cir 1974); *United States v. Bronstein*, 521 F.2d 459 (2nd Cir. 1975), *cert. denied*, 424 U.S. 918 (1976); *United States v. Race*, 529 F.2d 12 (1st Cir. 1976); *United States v. Meyer*, 536 F.2d 963 (1st Cir. 1976).

". . . I'll be happy for you to appeal. Some things in here I think should be appealed . . . ." (Tr. II 230)

"I think our Supreme Court should speak on it and any final court should speak on it . . . ." (Tr. II 231)

REASONS FOR GRANTING THE WRIT

I

THE DECISION IN THIS CASE IS IN CONFLICT WITH THE PRIOR DECISION OF THIS COURT IN *SIBRON v. NEW YORK*.

Three cases that the Court has agreed to hear this term[8] concern the scope of a policeman's power to obtain information from an individual. The question raised in these cases is one left open in a seminal set of decisions rendered ten years ago. In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court held that a policeman with "articulable facts" leading him to suspect that a person was carrying weapons could make a limited inquiry, denominated a "frisk," to ascertain whether the person indeed is carrying weapons. The Court explained that it was concerned with the "immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him." 392 U.S. 23.

In *Sibron v. New York*, 392 U.S. 40 (1968), *Terry's* companion case, the Court defined the limits of the *Terry* rule as bounded by the considerations that underlay it.

> "In the case of the self-protective search for weapons, [the officer] must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous. *Terry v. Ohio*, supra. [The officer's] testimony [in *Sibron*] reveals no such facts. . . . His opening statement to Sibron – "You know what I am after" – made it abundantly clear that he sought narcotics and his testimony at the hearing left no doubt that he thought there was narcotics in Sibron's pocket." 392 U.S. 64.

The Court concluded that the search in *Sibron* "was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception – the protection of the officer by disarming a potentially dangerous man." 392 U.S. 65.

Read together, *Terry* and *Sibron* hold that the "only goal" that justifies the inception of a warrantless search of a person detained on less than probable cause is the physical protection of those in the vicinity. In this case the activities and goals of the police are not disputed. Their action was based on a "drug courier profile" which the respondent readily conceded was not adequate to establish probable cause.[9] (Tr. I 51) In the prosecutor's words, the police felt only that there was a "possibility" that concealed drugs "may" be found. (Tr. I 50; *see* Tr. I 113)

The contents of petitioner's private luggage, stored in his personal sleeping compartment, are as deserving of Fourth Amendment protection as are the contents of a drawer of a person's desk at home. *E.g., United States v.*

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[8] *Brown v. Texas*, 77-6673; *Delaware v. Prouss*, 77-1571; *Michigan v. DeFillippo*, 77-1680.

[9] *See* footnote 2, *supra*. Testimony as to the accuracy of the profile in identifying those actually guilty of the crime was inconclusive. There was no indication of how many people matched the profile but did not possess drugs.

Chadwick, 433 U.S. 1 (1977); *Katz v. United States*, 389 U.S. 347 (1967); *cf.*, *United States v. Bronstein*, 521 F.2d 459 (2d Cir. 1975) (Mansfield concurring) (dictum). The police in this case were seeking to accomplish precisely what the police officer in *Sibron* sought to do. This case raises the question whether the officer in *Sibron* could have used a detector dog to locate what he was after and – because he then would not have needed to place his hand in Sibron's pocket to ascertain what he possessed – thereby have avoided an unconstitutional search.

II

THIS CASE SQUARELY RAISES AN IMPORTANT ISSUE UNDER THE FOURTH AMENDMENT WHICH HAS BEEN DECIDED IN A WAY THAT CONFLICTS WITH THE GOVERNING DECISIONS OF THIS COURT.

The barriers to discovery here were so extensive that the very fact of discovery without a warrant suggests that the Fourth Amendment, applied to the States through the Fourteenth Amendment, was violated.[10] Any device –

[10]Merely because the intrusion here was subtle and not embarrassing at the point of discovery does not mean that the Fourth Amendment was not offended. Over 90 years ago, in *Boyd v. United States*, 116 U.S. 616, 635 (1886), Mr. Justice Bradley made the following observation with respect to a proceeding that he described as "divested of many of the aggravating incidents of actual search and seizure, yet. . .contain[ing] their substance and essence, and effect[ing] their substantial purpose.":

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the

[footnote continued]

including a dog – that reveals the contents of locked airtight luggage located several feet away, beyond the locked door of a private compartment, intrudes on a person's privacy with a magnitude sufficient to require at least probable cause if not a magistrate's prior approval. Fifty years ago, in *Olmstead v. United States*, 277 U.S. 438, 473 (1928), Justice Brandeis observed:

> Subtler and more far-reaching means of invading privacy have become available to the government. Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.
>
> The progress of science in furnishing the government with means of expionage is not likely to stop with wire-tapping. . . . 'That places the liberty of every man in the hands of every petty officer', was said by James Otis of much lesser intrusions than these. To Lord Camden, a far slighter intrusion seemed 'subversive of all comforts of society'. Can it be that the Constitution affords no protection against such invasions of individual security?

This case raises again the question that troubled Justice Brandeis. It does so in the context of more recent decisions of this Court which appear to answer the question but in fact only raise it in a different context.

The decision below permits police to search personal belongings for contraband without a warrant, merely by

> security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance.

See Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973).

using a device designed to "open" something that otherwise could not legally be opened. It deprives the individual of the protection of the Fourth Amendment whenever he possesses something to which such a device can be attuned. Cases that accept these consequences appear to conceive of the Fourth Amendment not as an important constitutional principle but rather as an obstacle that resourceful policemen may sidestep.

Justice Brandeis' answer was that "[t]o protect [the individual's right to be let alone] every unjustifiable intrusion by the government upon the privacy of the individual, whatever means employed, must be deemed a violation of the Fourth Amendment." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, dissenting). Until relatively recently, however, the concept of "search" hinged on a physical intrusion into an area. If the means employed by police to effect an invasion of privacy did not intrude past a physical boundary, it was not regarded as a search. In *Katz v. United States*, 389 U.S. 347 (1967), the Court abandoned the concept of the breaking of a physical close as the *sine qua non* of an unconstitutional search, and in its place developed the concept of a perceptual close.

> "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." 389 U.S. 351-52 (footnote omitted, citations omitted).

With this shift in focus, the basis of analysis was no longer whether a particular means of intrusion involved a physical trespass. This case raises squarely the important question whether particular types of government intrusions into the perceptual close must occur before a

"search" has taken place within the meaning of the Constitution.[11]

The search in *Katz* was of a telephone conversation[12] which was cloaked by the way such conversations are effected: a speaker, a listener, and an electric impulse in a telephone line. The amplification without a warrant of sound waves bouncing off the structure of the telephone booth was condemned as an unlawful search.

> "The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which [Katz] justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning

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[11] This is not to say that, since *Katz*, positions have not been taken on this matter. A leading commentator predicted in 1974 that use of the phrase "government intrusions" to characterize the activities condemned in *Katz* could mislead future decision-makers who read it as descriptive and not normative.

> "If the word 'intrusion' is used, as 'violated' plainly was, to mean only that interests protected by the fourth amendment have been defeated by the 'Government's activities,' I have no quarrel with it. The problem with the word lies in its subtle suggestion that a particular kind or sort of government activity, labeled an 'intrusion,' is necessary to trigger the fourth amendment. But this, in my view, was precisely the approach to fourth amendment coverage that *Katz* decisively rejected." Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 383-385 (1974).

[12] *Corngold v. United States*, 367 F.2d 1, 3 (9th Cir. 1966), relied upon as the basis of the Court of Appeals' decision in *Katz*, approved warrantless use of a radiation detecting device in the hallway outside a suspect's apartment. This *Corngold* dictum, which in turn relied upon *Goldman v. United States*, 316 U.S. 129 (1942), is discredited if not overruled by *Katz* which explicitly overruled *Goldman*.

of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance." 389 U.S. 353

Trace-odors of contraband are no different from the sound waves that left the speaker's mouth in *Katz.*[13] Each is normally an undetectable byproduct of a secret which can be detected by special equipment in a place where the public may be, and can then be translated to reveal its private information.

In *United States v. Solis,* 536 F.2d 880 (9th Cir. 1976), which typifies the cases upon which the trial judge below relied, the Ninth Circuit reversed the District Court's holding that the use of a detector dog under circumstances similar to those here violated the Fourth Amendment. District Court Judge Pregerson's analysis is that required by this Court's prior decisions:

"The court believes that Solis had such an expectation of privacy. His trailer was completely enclosed – its interior was not exposed to public view. Furthermore, the odor of the marijuana secreted in the trailer was not perceptible to trained Government agents standing outside of or adjacent to the closed vehicle. But that odor. . .was easily detected

[13]This case actually is more egregious than *Katz,* in that the agents in *Katz* were assumed to have probable cause to install a listening device. If use of Czar can never violate the Fourth Amendment then Czar is a living general warrant which police may use to search at will. Failure to review this case will nourish police intrusions more extensive than those which would have followed a different ruling in *Katz.* To survey conversations takes time and concentration. Detector dogs do their job in seconds and thus may be deployed on a considerably greater scale than recording devices. These dogs tend to be dragnet-like, as Czar was.

by two trained Customs dogs whose keen olfactory powers are said to be 100% reliable in detecting certain narcotic substances. Thus, by employing the olfactory senses of two trained dogs, Government agents gained information substantially equivalent to what they would have acquired had they actually opened the doors and examined the trailer's concealed interior. Under these facts, the court finds that Solis did have a reasonable and justifiable expectation that the interior of his completely enclosed trailer was a private place protected from a search without a warrant issued upon probable cause, and that the use of these dogs contravened this expectation and invaded this private area." *United States v. Solis,* 393 F. Supp. 325, 327 (C.D. Cal. 1975), *reversed,* 536 F.2d 880 (9th Cir. 1976)

III

THERE ARE COMPELLING REASONS WHY THIS COURT SHOULD NOW REACH THE ISSUE RAISED IN THIS CASE.

The Circuit Court in this case has sided with those courts which view the reach of the Fourth Amendment as dependent on the police's ability to overcome perceptual barriers in order to intrude on a person's privacy. Faced with use of a detector dog in a public corridor – a kind of intrusion that several courts have now tolerated – the trial judge ruled that a "search" had not taken place. (Tr. I 245-246) But *cf. McDonald v. United States,* 335 U.S. 451 (1948). In contrast, the line of decisions of this Court culminating in *Katz* say, in Professor Amsterdam's words, that "this is precisely the approach to Fourth Amendment coverage that . . . [has been] decisively rejected." (Footnote 11, *supra*) Certiorari should be

granted because the decisions that sidestep the unanswered question posed by this Court's earlier opinions have taken a dangerously wrong turn.[14]

Those decisions, including the decision below, confuse the physical integrity of the wrappings of a package with the integrity of a suspect's expectation that the contents contained within that wrapping will remain secret. In *United States v. Chadwick*, 433 U.S. 13-14, note 8, the Chief Justice stated: "Respondents' principal privacy interest. . .was of course not in the container itself, which was exposed to public view, but in its contents." This is not simply a problem of semantics.[15] Certiorari should be granted because the conflict is basic.[16]

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[14] *See* Peebles, *The Uninvited Canine Nose & the Right to Privacy, Some Thoughts on Katz and Dogs*, 11 Ga. L. Rev. 75, 89 (1976). Peebles suggested that the decision in one such case "does little . . . to enhance the notion of privacy and drains the word 'search' of its commonsense meaning."

[15] When police use detector dogs to explore in quest of contraband they are engaged in an activity that the English language defines as a search. The Oxford English Dictionary gives as the first meaning of search: "To go about . . . in order to find . . . some person or thing; to explore in quest of some object."

[16] The logic of this divergent line of cases cannot be applied to the most egregious circumstance where detector dogs are used – the general search – and in that circumstance courts simply ignore it. Police either search when they use detector dogs or they do not search. But the California courts have read *Solis* to permit searches based on some cause, while also holding that general exploratory searches with detector dogs – searches where no eye has been focussed on a particular person or thing – violate the Fourth Amendment. *See, e.g., State v. Hill*, 64 Cal. App.3d 16, 134 Cal. Rptr. 436 (1977); *People v. Williams*, 51 Cal. App.3d 351, 124 Cal. Rptr. 253 (1975). This distinction cannot be reconciled with the decisions of this Court.

The important question of how far police may go without a judge's approval to confirm hunches about criminal activity needs to be addressed by this Court. The decision below encourages police, without any judicial check on their discretion, to use devices that defeat a person's legitimate expectations of privacy on the basis of a suspicion. The decision promotes the use of detector dogs and the development of other detecting devices to invade privacy interests that can be located on as many public concourses as the police find feasible. Unless the decision below is reviewed by this Court, that decision and others like it will cast serious doubt on the integrity of the privacy interests heretofore recognized by this Court.

CONCLUSION

For the reasons stated petitioner requests that this Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

VIRGINIA:

IN THE CIRCUIT COURT OF
THE COUNTY OF HENRICO

August 2, 1977

COMMONWEALTH OF VIRGINIA

V.

HARRY LINDSAY WOLKIND

ORDER – CASE No. 77F145

This day came the attorney for the Commonwealth, and Harry Lindsay Wolkind, age 23, born November 9, 1953, who stands indicted for a felony, to-wit: possession, with the intent to distribute, of a Schedule I controlled substance, to-wit: marijuana (Virginia Code Section 18.2-248), appeared according to the condition of his recognizance, and came also J. Flowers Mark and Frederick W. Ford, his attorneys.

By agreement of the attorney for the Commonwealth and the attorney for the accused, with the consent of the accused, this case was tried with Case No. 77F146, Commonwealth v. Harry Lindsay Wolkind.

Whereupon, the accused was arraigned and after private consultation with his attorney, pleaded not guilty to the indictment, which plea was tendered by the ac-

cused in person. And thereupon, after having been first advised by his attorney and by the Court of his right to trial by jury, the accused knowingly and voluntarily waived trial by jury, and with the concurrence of the attorney for the Commonwealth and of the Court, here entered of record, the Court proceeded to hear and determine the case without the intervention of a jury, as provided by law. In the process of hearing the evidence, the Court, on motion of counsel for the defendant and with the consent of the defendant noted in person and by counsel, conducted an *in camera* hearing during the testimony of Inspector Moss with respect to the Amtrak profile. After the evidence of the Commonwealth was presented, the defendant presented evidence on his motion to suppress the evidence seized on the train and the Commonwealth presented rebuttal evidence on that motion. The motion to suppress evidence was denied, to which the defendant objected.

Thereupon, the Court having by letter of July 12, 1977, denied the request of the defendant for an evidentiary hearing on his motion to dismiss the indictment, the Court received the proffer of testimony of Jack B. Carson, Dr. Lester Grinspoon, and Dr. Joel Fort by the defendant. The Commonwealth did not offer any proffers. The Court then heard argument on the motion to dismiss. The motion to dismiss was denied, to which the defendant objected.

Thereupon, the defendant moved to strike the evidence of the Commonwealth, which motion was argued and denied, to which the defendant objected.

The defendant then offered no evidence, and renewed all his motions, which were denied and objections noted.

Whereupon the Court found the accused guilty of possession, with the intent to distribute, of a Schedule I

controlled substance, to-wit: marijuana (Virginia Code Section 18.2-248), as charged in the indictment.

The Court on motion of the defendant by counsel before fixing punishment or imposing sentence, directs the Probation Officer of this Court to investigate thoroughly, and report to the Court on the 29th day of September, 1977, and a hearing on the sentence to be imposed is set for the 6th day of October, 1977, at 3:00 p.m., to which time this case is continued.

The Court testifies that at all times during the trial of this case the defendant was present in person and his attorney was likewise present in person and represented him capably.

The attorney for the defendant moved that he be allowed to remain on bond pending the receipt of the presentence report and sentencing hearing, which motion was granted. The bond of the defendant is increased to $8,000.00. The defendant is allowed to remain on his present bond until 12:00 noon on August 3, 1977, so that arrangements can be made to execute a new bond in the amount of $8,000.00.

A Copy Teste:

[Seal] MARGARET B. BAKER, Clerk

/s/ Brenda C. Jamison

csm Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 2nd day of August, 1978.

Harry Lindsay Wolkind,

Appellant,

against [Record No. 780239
Circuit Court Nos. 77F145
and 77F146]

Commonwealth of Virginia,

Appellee.

From the Circuit Court of Henrico County

Finding no reversible error in the judgments complained of, the court refuses the petition for appeal filed in the above-styled case.

A Copy,

Teste:

Allen L. Lucy, Clerk

By:

Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 31st day of August, 1978.

Harry L. Wolkind,

Appellant,

against [Record No. 780239
Circuit Court Nos. 77F145
and 77F146]

Commonwealth of Virginia,

Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 2nd day of August, 1978, and grant a hearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

/s/ Allen L. Lucy
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-860

HARRY WOLKIND,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF HENRICO COUNTY, VIRGINIA

JOHN R. ALDERMAN
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OCTOBER TERM, 1978

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HARRY WOLKIND,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

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QUESTION PRESENTED

Whether a person's Fourth Amendment rights are violated when a dog trained to detect drugs and absolute in its reliability, signals to police that drugs are present in that person's private train compartment, and the police thereafter search the person's compartment without a search warrant.

STATEMENT OF FACTS

On August 2, 1977, Petitioner was tried and convicted of possession of marijuana with intent to distribute in violation

of *Va. Code Ann.* § 18.2-248, and of possession of cocaine in violation of *Va. Code Ann.* § 18.2-250. Petitioner had entered pleas of not guilty to each indictment and was tried by the Henrico County Circuit Court sitting without a jury.

Respondent, the Commonwealth of Virginia, introduced evidence at trial that petitioner had been a passenger on an Amtrak passenger train which stopped in Henrico County on December 11, 1976. On that day, several police officers, together with an Amtrak Police Investigator, boarded the particular rail car on which petitioner had a private compartment. The officers had with them a dog which had been trained to sniff and alert on certain illicit controlled substances. The dog was taken through the common corridor of the rail car in which petitioner's compartment was located. The dog stopped and "alerted" on petitioner's compartment indicating the presence of drugs within. The officers knocked on the door of the compartment; petitioner answered; the officers entered the compartment with the dog. The dog alerted on two pieces of luggage, those pieces of luggage were seized, and petitioner was arrested. Later, pursuant to a search warrant, the luggage was opened and marijuana and cocaine were found inside.

REASONS FOR DENYING THE WRIT

I

DID THE ACTIVITIES OF THE POLICE OFFICERS AND THE DOG IN THE RAIL CORRIDOR CONSTITUTE A SEARCH?

Petitioner contends that the activities of the police in this case raise issues essentially analogous to those decided in *Katz v. United States,* 389 U.S. 347 (1967). In *Katz,* a telephone conversation from a public phone booth was intercepted by electronic means. Petitioner appears to suggest that the dog, intercepting the odor of drugs in the corridor, caused a similar intrusion upon petitioner's Fourth Amendment rights.

Respondent submits, however, that the analogy to *Katz* is fallacious in that in the present case, the police did nothing in the corridor which infringed or intruded in any manner upon the privacy of petitioner's activities. Petitioner in this case could assert no legitimate privacy interest in an odor which permeated the air in the common corridor.

Respondent submits that the activity of the police in the corridor was not a search; alternatively, if the activity in the corridor is assumed to have been a search, it was a search for which petitioner has no standing to object; and finally, the "search" in the corridor, if such it was, was a minimal, reasonable intrusion and not violative of petitioner's Fourth Amendment rights.

Testimony at trial revealed that petitioner was occupying a compartment in a rail car. He possessed a ticket entitling him to use that compartment to his destination. (Tr. 96-100). The corridor adjoining the compartment was a common area open to all aboard the train. As such, no search occurred in the corridor because petitioner was making no effort in the corridor itself to prevent discovery of anything; moreover, since the corridor was an area open to anyone legitimately on the train, petitioner could not realistically or legitimately expect any privacy there.

If, for the sake of argument, the activity of the police in the corridor amounted to a search, respondent submits that it was a search for which petitioner had no standing to object. An individual is entitled to attack the validity of a search and seizure only if (1) he owns or has the right of possession of the place searched, (2) he owns or has the right of possession of the property seized, or (3) he was

legitimately on the premises when the search occurred. *See, e.g., Brown v. United States,* 411 U.S. 223 (1973); *Chesson v. Commonwealth,* 216 Va. 827 (1976); *but see Rakas v. Illinois,* ..... U.S. ..... (5 Dec. 1975). In this case, although petitioner had the right to use the corridor, he neither owned nor had a right to possess the corridor; rather, he only had a right to occupy the compartment. Further, petitioner cannot say that he owned or had the right to possess the odor which the dog perceived. Such a claim would be akin to a claim that he owned the entire atmosphere wherever the odor might be detected; such a claim would be, on its face, patently frivolous. That the smell exited the luggage and drifted out of petitioner's compartment into the corridor was unavoidable. Respondent submits that no individual can realistically or legitimately possess an odor. Finally, since petitioner was not in the corridor, he cannot object to any search which may have occurred there.

In any event, the activities of the officers were reasonable, and constituted, at most, a minimal intrusion into privacy which in and of itself was inoffensive. Courts around the country have all but unanimously held that no constitutional rights are violated by such activity.[1]

[1] See, e.g., *United States v. Venema,* 563 F.2d 1003 (10th Cir. 1977); *United States v. Meyer,* 536 F.2d 963 (1st Cir. 1976); *United States v. Solis,* 393 F. Supp. 325 (C.D. Cal. 1975), rev'd., 536 F.2d 880 (9th Cir. 1976); *United States v. Bronstein,* 521 F.2d 459 (2d Cir. 1975), cert den., 424 U.S. 918 (1976); *State v. Martinez,* 26 Ariz. App. 210, 547 P.2d 62 (1976); *People v. Campbell,* 67 Ill. 2d 308, 367 N.E. 2d 949 (1977); cert. den. sub nom., *Myers v. Illinois,* 435 U. S. 942 (1978); *State v. Kaiser,* 91 N. M. 611, 577 P.2d 1257 (1978). But, c.f., *People v. Evans,* 65 Cal. App. 3d 924, 134 Cal. Rptr. 436 (1977); *People v. Williams,* 51 Cal. App. 3d 346, 124 Cal. Rptr. 253 (1975).

II

WAS THE SEARCH OF THE COMPARTMENT LEGITIMATE AND REASONABLE IN THE ABSENCE OF A SEARCH WARRANT?

Respondent submits that there was ample probable cause for the police, acting without a search warrant, to inquire and search petitioner's compartment after the police dog had "alerted" on that compartment.

Testimony at trial described the dog used by the police as having a sense of smell 100,000 times keener than a human's sense of smell. The dog also "alerted" only on certain controlled substances, i.e., marijuana, hashish, cocaine, heroin and amphetamines. (Tr. 128). Moreover, the dog *never* reacted falsely and *never* made mistakes in training or when actually on the job. (Tr. 137, 142). Respondent submits that the dog's reaction at the door of petitioner's compartment, in and of inself, was sufficient to give the police probable cause to search the compartment.

As will be discussed, *infra,* respondent submits that it was unnecessary for the police to obtain a search warrant prior to entering petitioner's compartment. At this juncture, respondent submits that probable cause to justify a search of petitioner's compartment existed. In *Aguilar v. Texas,* 378 U.S. 108 (1964), this Court held that a search is justified if based upon probable cause; probable cause amounts to information which is detailed enough for a judicial officer to believe that contraband is present at a location to be searched.

Respondent submits that the information available to the officers in the corridor was sufficient and detailed enough to give the police probable cause to search petitioner's compartment. The dog "alerted" at the door to petitioner's compartment, indicating to the officers that drugs were inside. (Tr. 134). The significance of the dog's "alert" was

explained by the dog's handler, another police officer; he explained that the dog *never* reacted to or "alerted" on anything which turned out not to be controlled drugs. (Tr. 137, 142). Additionally, the dog's sense of smell was at least 100,000 times more sensitive than a human's sense of smell. (Tr. 141). Thus, when the dog "alerted" at the door to petitioner's compartment, the police officers had information sufficient to give them a certainty that drugs were present inside.

Respondent submits that the actions of the dog and the information imparted thereby to the officers is analagous to the situation where an informant provides information as a basis for a search. *Aguilar, supra,* held that police could rely on an informant to justify a search provided that the informant gave information detailed enough for a judicial officer to find probable cause to believe that contraband is present at a given location; moreover, the judicial officer must have sufficient information to find that the informant is reliable.

The *Aguilar* standard was applied in the case of *United States v. Gazard-Colon,* 419 F.2d 120 (2d Cir. 1969). There, an informant gave police information that the defendant would be at a certain location, at an approximate time, would be in possession of heroin and would conceal it in a certain manner. The informant further gave information that he had been with the defendant shortly before the arrest, saw the defendant in possession of heroin and observed the defendant distribute the heroin. Finally, the informant had given police six tips in preceding months which led to three arrests and the seizure of some heroin. The Court of Appeals in *Gazard-Colon* held that this was more than enough information from which to find probable cause to believe that contraband would be present when the defendant was stopped, arrested and searched. Moreover, the

court found sufficient grounds to believe the informant to be reliable.

In the present case, respondent submits that the dog must be regarded as reliable since its sense of smell was at least 100,000 times keener than a human's sense, and the dog *never* reacted falsely and *never* made mistakes. Contrast this reliability to that of the informant in *Gazard-Colon* where the court knew that the informant gave incorrect information at least part of the time. It is submitted that the inescapable conclusion is that the dog was reliable as an "informant".

The second test of *Aguilar* requires a showing that the information imparted by the dog was sufficient to establish probable cause to believe that contraband was present in petitioner's compartment. Once again, the dog never reacted falsely and never made mistakes. On December 11, 1976, the dog reacted positively and alerted at the door of petitioner's compartment, indicating to the officers that drugs were present inside. Under these circumstances, respondent submits that the inescapable conclusion to be derived from the dog's actions is that there was probable cause to believe that drugs were present in the compartment. Thus, the two-fold test of Aguilar was met and the officers were justified in entering the compartment, searching and seizing two pieces of luggage.

Applying the "common sense and realistic" standard by which probable cause is to be considered, *United States v. Ventresca,* 380 U.S. 102 (1965), respondent submits that there was ample probable cause to justify the actions of the police in entering and searching petitioner's compartment.

Petitioner notes that the police used a "profile" to identify him as a suspect in this case. As indicated at trial, the profile was used by the police only as a preliminary step to utilizing the dog. (Tr. 150). Respondent concedes that the profile,

in and of itself, does not amount to probable cause to search petitioner's compartment. It only served to arouse the suspicion of the police leading them to investigate further. When the suspicions of police are aroused, logic dictates that investigation should be made. *See generally, Terry v. Ohio,* 392 U.S. 1 (1968), *Lawson v. Commonwealth,* 217 Va. 354 (1976); *Hollis v. Commonwealth,* 216 Va. 874 (1976). The only conceivable use of the profile was to enable the police to enter the rail car containing petitioner's compartment. Testimony at trial was that the dog was not led to petitioner's compartment; the dog was simply commanded to "find the drugs" and led the officers to the compartment. (Tr. 149-150). Use of the profile certainly cannot be imputed to the dog. Thus, use of the profile did not contribute to probable cause.

For the foregoing reasons, respondent submits that the police had probable cause to search petitioner's compartment.

III

WAS A SEARCH WARRANT NECESSARY IN ORDER TO SEARCH PETITIONER'S COMPARTMENT?

Evidence at trial indicated that petitioner was a passenger on a train enroute from Florida to Delaware. (Tr. 68). As such, the train was engaged in interstate commerce. At the time of the search, the train was stopped at a station in Henrico County for an approximate fifteen minute period. (Tr. 106). Based upon these circumstances, respondent submits that there were exigent circumstances justifying the search of petitioner's compartment without a search warrant.

Respondent first notes that the compartment was on a train stopped for only a short time in Henrico County. As such, because of that mobility, exigent circumstances such as those present in *Chambers v. Maroney,* 399 U.S. 42 (1970) govern. Had the police allowed the train to continue,

there would be ample opportunity for disposal of the drugs. Moreover, since the officers lacked probable cause to believe that drugs were in petitioner's compartment before they actually boarded the train with the dog, they could not have obtained a search warrant prior to that time. Under these circumstances, respondent submits that it was proper to search the compartment without a warrant. *Chambers, supra; Westcott v. Commonwealth,* 216 Va. 123 (1975).

Petitioner has asserted previously that the officers could have held the train in order to obtain a search warrant for the compartment. Testimony at trial was that trains have been held up for emergencies such as illness, (Tr. 109), but the Amtrak investigator in this case indicated that he had never held trains, that he had no control over them and that he had no authority to stop or hold a train. (Tr. 107, 108). For two reasons, such an assertion is meritless. First of all, "... the relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." *Cooper v. State of California,* 386 U.S. 58 (1967). Moreover, even if petitioner's compartment was kept under surveillance, such could not prevent destruction or disposal of evidence; proceeding with the surveillance, to follow the argument, would require the officers to wait outside the compartment.

Finally, testimony at trial indicated that after two pieces of luggage were removed from petitioner's compartment, they were thereafter opened and searched pursuant to a search warrant. (Tr. 171). During testimony about this matter, petitioner's counsel made no objection to the search warrant or the search of the luggage pursuant to the warrant. Impliedly then, such amounts to a concession that the information supplied by the dog gave the officers probable cause, both to enter the compartment and search, and to seize and search the luggage.

For the foregoing reasons, respondent submits that no search warrant was necessary for the officers to enter petitioner's compartment and search and seize the luggage.

IV

DOES THE DECISION IN KATZ v. UNITED STATES PRECLUDE ANY SEARCH FOR CONTRABAND EVEN IF POLICE HAVE PROBABLE CAUSE TO SEARCH?

Petitioner generally challenges the use of the dog in this case, drawing a parallel between the interception of a conversation, at issue in *Katz v. United States,* 389 U.S. 347 (1967), and the dog's detection of the odor of drugs. This Court, in *Katz,* however, did not lay down a blanket rule of individual privacy prohibiting all intrusions by police. Rather, it was recognized that the information possessed by government agents in *Katz* could have been used to obtain a search warrant, under which the intercepted conversations would be properly admitted into evidence. Thus, because the conversations were intercepted without a warrant, and this Court could not ascertain how any exception to the warrant requirement could apply to those facts, the evidence had to be suppressed. A reading of *Katz* leaves one with the distinct impression, though it is not expressly so stated in the body of the opinion, that the government agents had available to them, prior to the time they intercepted the conversations, information with which to establish probable cause and obtain a search warrant. This important fact is what distinguishes the present case from *Katz,* for, as indicated above, the police did not have probable cause until the dog alerted at the door to petitioner's compartment. That distinction, coupled with the inexorable mobility of the rail car containing petitioner's compartment, plus the avenues within the compartment through which the

drugs could have been disposed, i.e., the toilet and wash basin (Tr. 105-106), emphasizes that this case squarely falls within the recognized exceptions to the warrant requirement. As discussed above, respondent relies principally on the mobility of the rail car and on the disposability of the drugs.

For the foregoing reasons, respondent submits that the decision of *Katz v. United States* is not a bar to the search which occurred in this case.

CONCLUSION

For the reasons stated, respondent requests that this Court deny this Petition for a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John R. Alderman, Counsel for Respondent in above case have mailed by first class, three copies of Brief in Opposition, to Charles A. Horsky, Esquire; Eric A. Eisen, Esquire; John F. Mark, Esquire; Frederick W. Ford, Esquire, all of 888 16th Street, N.W., Washington, D. C. 20006, Counsel of Record for the Petitioner for Writ of Certiorari to the Circuit Court of Henrico County, Virginia.

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IN THE

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PETITIONER'S RESPONSE TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Respondent has not contended that this case is not worthy of certiorari. Accordingly this Response is written only to clarify the limited scope of petitioner's contention before this Court and briefly to address the question of the legitimacy of petitioner's expectation of privacy; *i.e.*, the question of petitioner's "standing" to assert his fourth amendment rights. In light of respondent's Brief in Opposition to issuance of the writ, petitioner begins by identifying some contentions he does not make in this Court.

Petitioner does not contend that Czar, the detector dog, is less than perfect in locating particular hidden substances. Petitioner has not argued here that the police, after Czar "alerted" on a train in their jurisdiction, acted unreasonably.[1] Petitioner's position is simply that when the police first used Czar in the corridor to confirm a hunch about what lay in petitioner's suitcases they violated petitioner's right to the assurance that his privacy will be judicially protected from arbitrary police intrusion.

In this case the only reason police boarded petitioner's car of the train was because an unidentified individual in Florida became suspicious.[2] Petitioner was searched in Henrico County, Virginia, because "dogs are very scarce along our lines and . . . [there were not] any other animals . . . [available]." (Tr. I 113) The question presented is whether police may thus search individuals for contraband without obtaining the approval of a judicial officer.

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[1] Accordingly, petitioner does not argue that the police need have held the train to go through the formality of obtaining a warrant once Czar told them that there was no doubt that petitioner's compartment contained contraband. Before Czar was brought to the station police had adequate time to obtain a warrant but of course had nothing approaching a basis upon which to do so.

[2] The asserted basis for that suspicion – a "match" with a "profile" – is in fact a simple description: petitioner was a young man traveling north first class who had appeared nervous to the observer. The record reveals no testimony or statistical evidence regarding how accurate the "profile" used by the police here was in picking out individuals possessing contraband. (See. Tr. I 47-71.) Nor is there any indication of what discretion police had in interpreting and acting upon particular profile comparisons. Neither party in this case has ever contended that the "profile" was more than minimally relevant. What the parties differ about is whether petitioner's "match" with the "profile," non-probative as that "match" was, could legitimize the warrantless use of Czar several hours later.

The microphone located in a place open to the public in *Katz v. United States*, 389 U.S. 347 (1967), detected vibrations of a closed telephone booth's glass caused by Katz speaking into the telephone within. Katz knew that all of the sound that left his mouth would not be captured and transmitted by the telephone. Inevitably such uncaptured sound must escape the booth and be un-owned in a public place. The point, notwithstanding the inexorable laws of physics, is that when a person uses a private telephone booth he becomes "entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." 389 U.S. 352.[3] *Katz* holds that a person's expectation of privacy should not fail merely because police can defeat it without effecting a physical trespass.

In *Rakas v. Illinois*, ___ U.S. ___, No. 77-5781 (12/5/78), Justice Rehnquist explained that one who has a right to exclude others from enjoyment of property likely will have a legitimate expectation of privacy by virtue of having that right. Petitioner has this right with respect to the sealed luggage in his private roomette and is entitled to assume that his expectation of privacy will not be defeated. *See United States v. Chadwick*, 433 U.S. 1 (1977); *cf. McDonald v. United States*, 335 U.S. 451 (1948). Petitioner does not have a right to exclude people from the hall, but to say that he therefore may not legitimately expect that people located in the hall will respect his interest in the privacy of his room and his

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[3] Respondent's suggestion that *Katz* should be limited to situations where police have probable cause to search before they use a device—and fail nonetheless to use the device by authority of a warrant—is puzzling. It would reward ignorant police by permitting them to search at random and would penalize the skillful policeman by requiring that he obtain a warrant.

luggage—to say that police may lawfully inquire into a secret place by detecting and interpreting an incidental and inevitable molecular discharge into a public place—posits that the constitutional right to have private places extends no farther than the rights protected by the common law of trespass. This is precisely contrary to *Katz*. This is not the teaching of *Rakas*. The most sophisticated "lock" is only effective in the absence of devices that can defeat its purpose.

If certain cases stand contrary to the proposition that what petitioner carried was private to him, then it is clear that they qualify an individual's right to be free of unwarranted intrusions into his most personal possessions. They undercut the decisions of this Court by permitting invasions of recognized sanctums of privacy without any judicial restraint or review whenever the invasion can be accomplished from places open to the public.[4]

In this case petitioner's expectation of privacy from poking noses such as Czar's matches the specific factors mentioned in the concurring opinion in *Rakas* as relevant to whether a person's fourth amendment rights have been violated.

> "In considering the reasonableness of asserted privacy expectations, the Court has recognized that

[4] Respondent's informant theory similarly fails to account for the interest invaded. Informants may not break locked compartments to discover their contents when police order them to do so. Czar acts to inform, but he does so no differently than the sensitive microphone or x-ray machine. Czar's use to inform is unlawful here because his use infringed an interest of the petitioner that the fourth amendment was designed to protect – the petitioner's interest in the privacy of the contents of his luggage. The informant theory begs the question, eliding the issue whether an instrumentality of the state may defeat a legitimate expectation of privacy.

> no single factor invariably will be determinative. Thus, the Court has examined whether a person invoking the protection of the Fourth Amendment took normal precautions to maintain his privacy—that is, precautions customarily taken by those seeking privacy. See, *e.g.*, *United States v. Chadwick*, 433 U.S. 1, 11 (1977) ("By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination"); *Katz v. United States*, 389 U.S. 347, 352 (1967) ("One who occupies [a telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world"). Similarly, the Court has looked to the way a person has used a location, to determine whether the Fourth Amendment should protect his expectations of privacy. In *Jones v. United States*, 362 U.S. 257 (1960), for example, the Court found that the defendant had a Fourth Amendment privacy interest in an apartment in which he had slept and in which he kept his clothing. The Court on occasion also has looked to history to discern whether certain types of government intrusions were perceived to be objectionable by the Framers of the Fourth Amendment. See *United States v. Chadwick*, 433 U.S., at 7-9. And, as the Court states today, property rights reflect society's explicit recognition of a person's authority to act as he wishes in certain areas, and therefore should be considered in determining whether an individual's expectations of privacy are reasonable. See *Alderman v. United States*, 394 U.S. 165 (1969)." *Rakas v. Illinois*, ___ U.S. ___, No. 77-5781 (12/5/78) (Powell, concurring).

It is undisputed that petitioner took precautions to keep secret the contents of his luggage, and used his roomette and stored the luggage in a manner that is indistinguishable from that of the victim of the search in *Jones*. Viewing the question historically, it is hard to conceive that the founding fathers would have found any less objectionable a search for untaxed quantities of tea by the use of dogs than by the general search. To posit, when a detector dog is used in public places to determine the contents of sealed luggage in private places, that the societally recognized sanctity of such luggage is not offended or that the individual possessing such luggage is not the victim of state activity that invades his privacy, "does little . . . to enhance the notion of privacy and drains the word 'search' of its commonsense meaning." Peebles, *The Uninvited Canine Nose and the Right to Privacy, Some Thoughts on Katz and Dogs*, 11 Ga. L. Rev. 75, 89 (1976). If use of Czar does not violate petitioner's right to privacy simply because Czar can work from a public place, then no property can be safe from long range surveillance through detection of invisible light waves, inaudible sound waves or imperceptible molecules.

CONCLUSION

For the reasons stated in the Petition for Certiorari and in this Response, petitioner requests that this Court issue its writ.

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